No. 2463.

In the United States Circuit Court of Appeals for the Ninth Circuit.

THE SOUTHERN PACIFIC COMPANY, PLAINTIFF IN ERROR,

v.

THE UNITED STATES OF AMERICA, DEFENDANT IN ERROR.

SUPPLEMENTAL BRIEF OF DEFENDANT IN ERROR.

PHILIP J. DOHERTY,
Special Assistant United States Attorney.

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ARGUMENT.

I.

The first point raised by the plaintiff in error is that there was evidence sufficient to require the court to submit the case to the jury. The complete reply to this contention of the plaintiff in error is that, in the case at bar, both parties asked for peremptory instructions. (Rec., p. 59.)

This amounts to a withdrawal of the case from the jury. *Beutell* v. *Magone,* 157 U. S., 154.)

II.

The plaintiff in error contends that the delay which caused the overtime service was excusable within the exception contained in the proviso, section 3 of the act, as being the result of a cause not known and which could not have been foreseen

before or at the time this train left its starting terminal.

This position is clearly untenable under facts recited in this record.

The record clearly shows that there was in this case no casualty, unavoidable accident or act of God which intervened to ~~prevent~~ cause the overtime service. It is the contention of the Government that no causes other than the three above mentioned operate to relieve a carrier for excess service of its employees. It can not have been the intent of Congress to have recited three particular causes as exceptions to the act and then leave the entire act open to exceptions generally from *any* cause of any name or nature or of any character.

The reasonable construction of the proviso is that the three specific causes are excuses when not known and not possible to have been foreseen at the time a train left a terminal. Admitting that the causes in this case were not known and could not have been foreseen at the time this train left its starting terminal, they were the ordinary causes incidental to train operation, and as to such causes the proviso does not operate as an excuse.

III.

The releases in this case do not relieve the carrier from the liability created by the act. These releases were merely *pro forma*. The record shows this. On page 62 appears the telegram from the train dispatcher under which this so-called release was

given. It reads as follows: "As you have to use the local eng there will be no eng for local crews to work with release the local crews and call for when can give them an eng advise time released and recalled see it is as much as an hour so we can get credit for it."

And the telegram from the conductor on the same page does *not* indicate that the train crew was notified when they were released at Bowie at 9.15 that the release was until 11.40, but merely recites "Ext. 2813 west was released at Bowie at 9.15 a. m. Called to go to work at 11.40 a. m., released at 1.20 p. m. to go to work at 2.20 p. m." The difference between the form of the two releases as indicated in this telegram is to be noted.

Furthermore, the conductor's trip report (Rec., p. 63) shows "total time in service, 18 hours 55 minutes." This is also emphasized by the engineer's trip report (Rec., pp. 66 and 67), "*time on road, 18 hours 40 minutes.*" "*Claim continuous time from 6 a. m. to 12.40 a. m.,* or *18 hours and 40 minutes.*" (Rec., p. 67.)

That the release was given for the purpose of allowing the period covered by it to extend the time of service is shown in the testimony of William Wilson, the chief dispatcher (Rec., p. 39), "that I may consider the period they were released as being off duty."

Train Dispatcher Wilson also testified (Rec., p. 43), speaking of the first release: "That message did not tell them any definite period to release the

crew. It simply said 'release them.'" * * * "I don't know where they went or what they did, *only they must have remained at Bowie.*" "If the release was definite from 9.15 a. m. to 11.40 a. m., they would report again at 11.40 a. m. without being called." But the telegram of the conductor (Rec., p. 62) shows that they were *called* at 11.40 a. m., which would seem to indicate that the release was not definite, otherwise they would have reported without being called, according to the testimony of Chief Dispatcher Wilson.

This is more clear by the statement of the witness Wilson (Rec., p. 44): "They didn't know when they were released how long they would be at Bowie * * * the release was given to cover the delays we saw would be encountered at Bowie."

Again, on page 45, "If I had wanted these men to go to work before the 2 hours and 25 minutes was up I would have instructed the agent to call them."

To show that these men were on duty and subject to orders during the whole time covered by this trip, attention is called to the orders of Chief Dispatcher Wilson (Rec., p. 46): "If I had found we wanted them at 10 o'clock I had a right to call them, but I didn't need them."

Conductor Sullivan testified (Rec., p. 52): "I did not receive any message at Bowie that I was released; the operator told me I would be off duty until called."

As to the release of one hour to the engineer, B. F. Eaker, his statement that he received a mes-

sage "Release engineer and fireman for *at least* one hour" does not seem to establish a release for a fixed and definite period.

While there may have been some difference in the statements made by some of the witnesses as to the definite or indefinite nature of the release and as to whether or not there was a definite time fixed at the time the release was given for the men to again go on duty, the case having been submitted to the court by the request of both sides for peremptory instructions, the finding of the court on the questions of fact involved, where there was *any* evidence to justify it, is conclusive, and can not be reviewed here.

The first telegram from the train dispatcher (Rec., p. 62) places this case squarely under the decision of the Supreme Court of the United States in *Missouri, Kansas & Texas Railway* v. *United States* (231 U. S., 112).

But assuming *for the purpose of argument only* that there was a definite release given, as claimed, to the engine crew and train crew for the respective periods mentioned, it is respectfully submitted that such temporary releases are not effectual to break the continuity of service of train employees while attached to the train in the course of its journey from one terminal to another.

In this case there is a mere transient absence from the train, with the intention of returning and continuing duty thereon.

It is the ordinary case of employees who stand ready and willing to complete a duty set before them, which they are prevented temporarily from actively continuing by the master, who thereby enlarges the period within which duty must be performed. Their continued readiness to perform the specified service is equivalent to actual performance.

They remain under orders; that is, under orders to wait and be in readiness at the time appointed, if there is a definite time given in the release. It was merely a time during the trip when conditions were such that there was no actual work to do. They simply waited until the time for the actual resumption of work.

The intervals were not advantageous or restful. They were prejudicial and increased instead of lessened the burden of carrying the train on to its destination.

The New York Supreme Court, in the case of *People* v. *Erie Railroad Company* (198 N. Y., 369; 91 N. E., 849, p. 851), said: "It not infrequently happens that the *lack of active occupation* during hours of duty is *more trying* than work itself." This dictum is merely expressive of that which is of general knowledge. The burden of waiting and the strain resulting therefrom is ordinarily so trying that it can not be presumed that Congress intended to permit that there should be superimposed upon the service of 16 hours the

burden, the strain, and the duty to wait during other periods of time as an additional duty.

Such releases do not release—they detain. They do not result in rest, but in added burden.

It is a continuous duty until the full duty of the trip is performed. While a train crew is detained for further duty yet to be performed they are on duty within this law.

The words "for a longer period than 16 hours" includes the initiation of work, attachment to and service upon a given train, obedience to all orders, and to final release from all duty after 17½ hours, as in this case, although there were orders which called for no active performance of duty during the delay incidental to the trip caused by no casualty, unavoidable accident, or act of God.

The nexus which binds a train crew to its train and to continuous duty until officially released is not broken by temporary permitted absence from the train while en route. Such releases as are here involved only increase the time of the performance of duty. Time is added. Relief is delayed. The passage of longer time of making the trip makes duty more arduous. Work is extended for a more wearying period. There must be a greater physical and mental strain. The opportunity for a restful period of sleep is postponed. The purpose of the act is violated.

Indeed, the act would be of little value and of little relief from the dangers which it was enacted to prevent if the contention of the plaintiff in error

was sustained. (*North Carolina Railroad Co.* v. *Zachary,* 232 U. S., 248.)

In the case just cited one of the headnotes is as follows: "Although absent temporarily from his train for a short time for a purpose not inconsistent with his duty to his employer, a railroad employee may still be on duty and engaged in interstate commerce within the meaning of the Employers' Liability Act of 1908," and Pitney, Justice, delivering the opinion of the court, on page 260 said:

> There is nothing to indicate that this brief visit to the boarding house was at all out of the ordinary or was inconsistent with his duty to his employer. It seems to us clear that the man was still " on duty " and employed in commerce, notwithstanding his temporary absence from the locomotive engine. (See *Missouri, Kansas & Texas Railway Co.* v. *United States,* 231 U. S., 112, 119.)

In 5 Labatt, Master and Servant, 52, 53, it is said: " It can not be said that a conductor is not in charge of a train during a temporary absence therefrom," citing 133 Mass., 356; 182 Mass., 237.

Judge Maxey, in *United States* v. *St. Louis South Western R. R. Co.,* 198 Fed., 954, speaking of this statute, said:

> It is not within the power of a carrier by means of shifts and evasions of any kind or character to nullify a statute obviously intended as was the present act to promote the safety of employees and of the traveling public.

It is therefore contended that the period of service of train employees can not be extended beyond the period of 16 hours by the mere device of releases at such times as the train is delayed by the usual causes incident to operation.

In the case of *United States* v. *Southern Pacific Co.*, 209 Fed., 562, the Eighth Circuit Court of Appeals, referring to its opinion in the case of *United States* v. *Kansas City Southern*, 202 Fed., 828, said: "*If the usual causes of delay incident to train operation were to excuse, then the statute would be wholly ineffective to accomplish its purpose.*"

If *delays* under such circumstances do not excuse, why should an *order to delay* under such circumstances excuse?

A release of the character in question here is a mere order to wait or to delay.

It is respectfully submitted that such a device can not be operative to extend to more than 16 hours the period within which duty is required on the part of a train or engine crew of a train en route to its fixed destination.

This court, in the case of *Great Northern Railway Company* v. *United States*, dated February 24, 1914, said: "Tying up on a siding for any purpose, whether to await orders or for the passing of other trains or for any other purpose connected with the transportation of freight or passengers, *is as much a part of the general movement of a train as the actual running thereof* on the main line and at scheduled periods. * * * *Such delays are a*

part of the general operations whereby traffic over railroads is conducted." (211 Fed., 309.)

IV.

As plaintiff in error has not argued in its brief the exceptions and assignment of errors arising out of the exclusion by the district court of certain exhibits and evidence, it may be concluded that these exceptions and assignments are waived.

In any event there was no error in excluding the evidence in question. The exclusion of testimony as to whether or not these employees were *on duty* during the time covered by the release was justified, as this was the *ultimate fact* involved in the case.

A question which calls for the opinion of a witness as to the ultimate fact which is in issue is properly excluded.

Keefe v. *Armour Co.,* 258 Ill., 28; 101 N. E., 252; Ann. Cas. B., 1914; B–188 and cases cited in note. Also note to *Hammond* v. *Woodman,* 66 Am. Dec., 219, 230; *Martin* v. *Des Moines Edison Light Co.,* 131 Ia., 739; 106 N. W., 359.

For all the reasons herein set forth the plaintiff in error contends that there was no error in the rulings of the district court.

Respectfully submitted on behalf of the defendant in error.

PHILIP J. DOHERTY,
Special Assistant United States Attorney.

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